

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1307

To be argued by
ROBERT J. JOSSEN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1307

UNITED STATES OF AMERICA,

Appellee,

—v.—

HARVEY S. MEYERS,

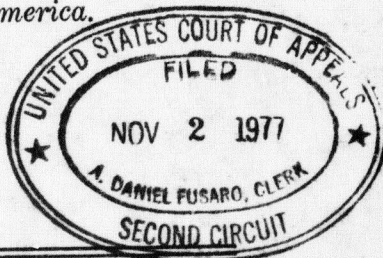
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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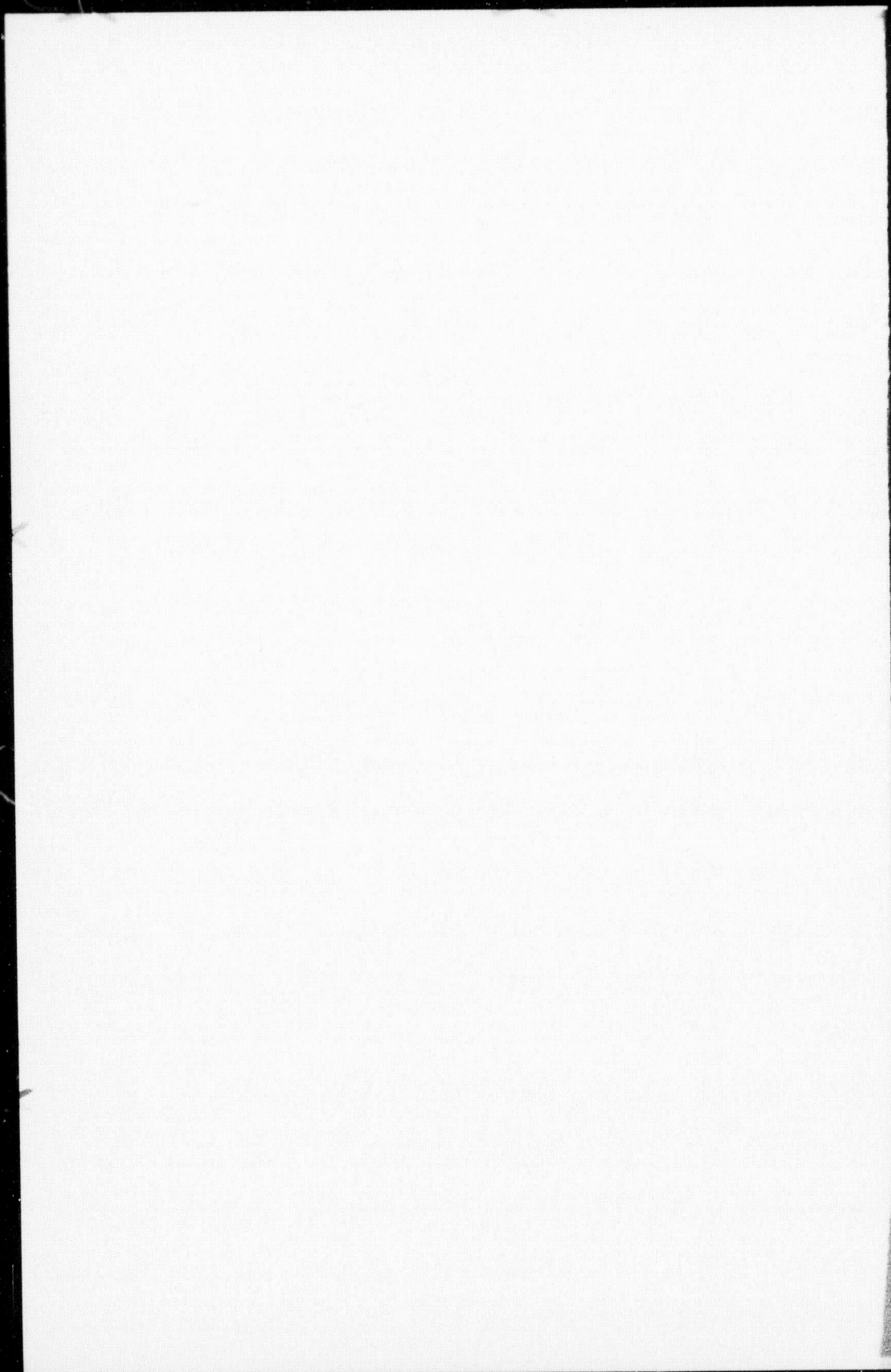


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Docket No. 77-1307

UNITED STATES OF AMERICA,

Appellee,

—v.—

HARVEY S. MEYERS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Harvey S. Meyers appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York, on June 17, 1977, following a four-day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 77 Cr. 227, filed on April 4, 1977, charged Meyers in two counts with attempting to evade and defeat a large part of the income tax due and owing by him for the calendar years 1971 and 1972, in violation of Title 26, United States Code, Section 7201.*

* Each count charged that the means of attempted evasion was defendant's filing of a false joint individual income tax return, in the names of Harvey S. Meyers, and his wife, Maria Meyers. Specifically, Count One charged that Meyers' taxable income for the year 1971 was in fact \$51,437.00, whereas he reported taxable

[Footnote continued on following page]

Trial on the indictment commenced before Judge Briant on May 2, 1977 and concluded on May 5, 1977, when the jury returned verdicts of guilty against defendant on the two counts.

On June 17, 1977, Judge Briant sentenced Meyers to a term of imprisonment of two years on each of Counts One and Two, the sentences to run concurrently, and to a fine of \$5,000 on Count One.

Meyers presently is at liberty on bail pending the disposition of this appeal.

Statement of Facts

The Government's Case

A. A Brief Overview

The evidence at trial convincingly demonstrated that Harvey S. Meyers attempted to evade the lawful taxes due on substantial amounts of his income in the years 1971 and 1972. Specifically, the proof showed that Meyers, who was a stockbroker on the New York Stock Exchange, deliberately failed to report approximately \$29,362.89 in commissions received by him in 1971, and approximately \$56,921.77 in commissions in 1972. The Government also proved, as charged in the indictment, that in 1972 Meyers deliberately failed to report his receipt of the proceeds of a \$25,000 loan to his brother-in-law—a loan that Meyers had reported as a bad business debt on his 1971 income tax return and for which he obtained a tax benefit.

income on his individual return in the amount of \$21,587. Count Two charged that Meyers' taxable income for the year 1972 was in fact \$134,286.09, whereas he reported taxable income on his individual tax return in the amount of \$52,366.00.

The Government's case amply refuted the purported defense of a lack of intent—bolstered upon a claim that Meyers' accountants, Ernst & Ernst, had been negligent in the preparation of defendant's tax returns—and showed a course of repeated, deliberate and intentional conduct by Meyers. The evidence was presented through several documents showing Meyers' actual gross commission receipts, the testimony of two accountants who prepared defendant's returns, as well as defendant's brother-in-law.

B. The Nature of Meyers' Job and His Source of Income

In 1971 and 1972 Harvey S. Meyers was a "\$2.00 Broker" on the New York Stock Exchange. In essence, Meyers was a "broker's broker," regularly handling buy and sell transactions on the floor of the Exchange for other brokers, as opposed to retail customers, who paid him a commission for his efforts. (A. 319-20; GX. 1, 2).^{*} Following buy or sell transactions, Meyers prepared a commission bill against the broker for whom he had acted and submitted it to the Stock Clearing Corporation, ("Clearing Corp.") a middleman clearinghouse. The Clearing Corp., in turn, passed these bills on to the respective brokers, on a monthly basis, and, after receiving approval of the bill from the brokerage account to be debited, issued a single monthly check to Meyers in payment of his total commission from all brokers for the month. (A. 240-243). In addition to the single monthly check, the Clearing Corp. prepared and sent to Meyers a summary form—called a commission bill settlement state-

^{*} References to the Joint Appendix, which includes the full trial transcript, are cited as "A."; "GX." refers to Government Exhibits received in evidence; "DX." refers to Defendant's Exhibits received in evidence.

ment—that reflected Meyers' total gross commissions for the preceding month. (A. 245; GX. 19, 20).

Under the rules and regulations of the Exchange, Meyers, like any broker-member of the Exchange, was required to prepare and submit to the Controller's office a signed form—called a form "600"—that reported the broker's gross commissions for the prior month. (A. 321-22; GX. 21, 22).^{*} As a regular practice the information contained on the commission bill settlement statements and the forms "600" was *not* communicated by either the Clearing Corp. or the Exchange, to the Internal Revenue Service. (A. 245; 323).

C. The Preparation of Meyers' Tax Returns

1. The 1971 Return

In order to have his joint individual income tax return for 1971 prepared, Meyers, as he had done in the past, sought out the assistance of the accounting firm of Ernst and Ernst ("E & E"). In due course, E & E assigned this task to a senior member of its accounting staff, James Crumlish, a certified public accountant. Crumlish first met with Meyers in March, 1972, to discuss preparation of the return. At that time, Meyers gave to Crumlish a large package of individual commission advices—the separate bills that Meyers submitted to the Clearing Corp. after transactions, as opposed to the single monthly commission bill settlement statement—around which was wrapped a single adding machine tape. (A. 172-76; 225-26; GX. 4, 4A). At the same time, Meyers also gave Crumlish a detailed schedule of proposed deductions. On the bottom

^{*} These forms "600" were used by the Exchange to calculate a 1% commission fee uniformly charged against all members. The completed forms "600", which were available to members upon request, were filed under penalty of possible disciplinary sanction if deliberately inaccurate. (A. 321-22).

of the single adding machine tape around the commission advices appeared the notation "Total Gross Floor Income", written in defendant's handwriting and showing the amount \$89,749.50. (GX. 4, 4-A, 27; A. 562).

Crumlish later took the information supplied to him by Meyers, analyzed it, and prepared defendant's 1971 tax return. After checking all materials to make sure he had all of the advices, Crumlish compared the individual commission advices one-by-one against the corresponding tape, and found no discrepancy. (A. 179, 183, 187-88, 207, 217). He then transferred the total gross commission figure of \$89,750 onto line 1 of Schedule C of the preparation sheets for the federal tax return, and that figure appeared on the return as actually signed and filed by defendant. (GX. 1, 3-A; A. 182-83, 186-87, 196, 200, 338).*

In fact, contrary to the information supplied by Meyers to Crumlish, defendant's actual gross commission receipts for 1971 were \$119,112.89, thus resulting in an understatement of \$29,362.89 of commissions received. The correct amount of gross commissions was reflected on the 12 forms "600" and the 12 commission bill settlement statements for 1971, documents that Meyers never supplied to his accountant. (GX. 19, 21; A. 202; DX.S.).

2. The 1972 Return

Meyers' joint individual tax return for 1972 was prepared in a similar manner as the 1971 return by E & E

* Crumlish used computer work-sheets in the preparation of the return. These sheets later were sent to a computer center which checked Crumlish's tax computations and printed the return itself. The completed federal return, together with the New York City & State returns that were also prepared for Meyers by E & E, were mailed to defendant and his wife. Both Meyers and his wife signed the returns. (A. 189, 195, 200-201; GX. 3-B).

on the basis of information supplied by defendant. Early in 1973, Meyers' account was assigned to another member of the E & E tax department, Michael Rubin, an attorney and practicing accountant.* (A. 59-60, 106). As had his predecessor on the same account, Rubin met with Meyers in the offices of E & E to discuss preparation of the return for 1972. Again, Meyers gave Rubin a schedule of income and expenses, as well as a large package of individual commission advices also enclosed by a single adding machine tape. At this meeting, Meyers confirmed to Rubin the accuracy of the total gross receipts figure which appeared on the bottom of the tape and on the income schedule. (A. 60-64, 112-113, 127, 168). Rubin noted the total gross receipts figure provided by Meyers, in the amount of \$100,231, on his work papers. (A. 71; GX. 5A).

Following Meyers' departure from the office, Rubin proceeded to analyze and classify for tax purposes the information given to him by Meyers. Rubin double-checked the figure for total gross receipts that appeared on the bottom of the adding machine tape against the notation made by him in his work papers, but did not go through the individual commission advices, as had Crumlish in the previous year. Again, Rubin found that the \$100,231 figure which appeared on the tape corresponded to the total amount confirmed orally by Meyers at their earlier meeting. (A. 65-66, 71-72, 153).** Using the information provided by defendant, Rubin made the appropriate entries on the computer work-sheets, which then were sent to the computer center to check Rubin's calculations and to print the return. Once the return was printed, Rubin personally delivered it to Meyers at his home, where

* At the time of the trial Rubin was a CPA, although he had not yet been certified in 1973.

** Meyers also provided Rubin with a package of bank statements. Rubin asked Meyers what he wanted him to do with these materials, and Meyers responded that he wanted Rubin simply to store them. (A. 64-65, 115, 122, 154).

defendant and his wife reviewed and signed the return. (A. 71-73, 75; GX. 2).*

Again, contrary to the information reported by Meyers to his accountant and reflected on defendant's 1972 return, Meyers' actual total gross commission receipts amounted to \$157,152.77, as opposed to the reported figure of \$100,231—resulting in an understatement of \$56,921.77 in income. The correct total gross receipts was conveniently and simply shown on the 12 forms "600" and the 12 commissions bill settlement statements, documents which Meyers' again did not turn over to his accountant. (GX. 2, 20, 22; DX. T; A. 100).

D. The Fernandez Transaction

1. The loan is made in July, 1971

In July, 1971, Meyers proposed to make a personal \$25,000 loan, interest free, to his brother-in-law, Marcelino Fernandez.** Fernandez, who did not need or ask for the money, was led to believe that Meyers wanted him to take this loan as a favor for defendant, for some unexplained reason. In any event, Fernandez readily agreed to the loan, and soon received Meyers' personal check in the amount of \$25,000, made payable to "Marcelino Fernandez" for a "personal loan." (A. 246, 248-49, 253, 279-80; GX. 9, 14).*** Fernandez then deposited this check

* Rubin also prepared the 1972 New York City and State income tax returns for Meyers.

** Fernandez was called as a witness by the Government and testified under a formal grant of immunity. (A. 247).

*** At the time the check was mailed to Fernandez, it was accompanied by a handwritten note from Meyers (GX. 14) which confirmed that the loan was "a personal loan, non-interest bearing." (A. 566, 286).

into the bank account of his San Juan, Puerto Rico, business, Frozens, Inc., a meat distributing company, and issued a receipt to Meyers acknowledging the loan. (A. 252, 286; GX. 9, 15).

Although Fernandez was in a position to repay the \$25,000 at any time upon reasonable notice, Meyers did not ask for repayment throughout the remainder of 1971, nor had Fernandez ever advised Meyers that he was unable to repay the loan. Late in the year, however, Fernandez insisted that Meyers accept a payment of interest on the outstanding loan. Meyers, who at first refused to accept any interest, reluctantly agreed to receive such a payment, but insisted that the check be made payable to his daughter, Alexandra Meyers. (A. 254-55, 266, 279, 309; GX. 10).

2. Preparation of the phony letters

At some time during the period between December, 1971 and October, 1972, Meyers told his brother-in-law that he needed letters to show that the \$25,000 loan purportedly had been invested in a business transaction and subsequently lost. In response to Meyers' request, Fernandez prepared three bogus letters which, in essence, reflected that the \$25,000 loan had been made as a meat-commodity investment, that the investment had soured, and that the \$25,000 had been lost. (A. 256-60, 302-04; GX. 28, 19, 30).*

* GX. 28 was a back-dated letter of July 28, 1971, which acknowledged receipt of the \$25,000 for an investment in a foreign meat deal. (A. 575). GX. 29 and 30 were letters, dated November 10, 1971 and January 28, 1972, respectively, which reported that the investment had gone bad and that the money had been lost. (A. 576-77). Fernandez testified that, in reality, he and Meyers never had any understanding that the \$25,000 loan was for an investment of any sort, and that the money always was available for repayment. (A. 260-61).

3. The \$25,000 is taken by Meyers as a business bad debt deduction in 1971

At the first meeting concerning preparation of his 1971 tax return, Meyers told Crumlish that he had incurred a \$25,000 business bad debt during the year, which he wanted to take as a deduction on his tax return. This debt had been described by Meyers as the \$25,000 Fernandez loan. (A. 177; 562(4); GX. 7). Crumlish told Meyers that he needed substantiation both for the loan and the fact that the investment had been lost.

Shortly thereafter, Meyers supplied to Crumlish letters that showed the investment had been made and lost, as well as a cancelled \$25,000 check, payable to Marcelino Fernandez, with the notation "Personal Investment In P.R. Loan for Joint Participation in Business Transaction." (A. 178-79, 190-91, 222-23; GX. 9-A; A. 563(2)).* Thus satisfied with the purported documentation of the loss of the \$25,000, Crumlish acceded to Meyers' request and took the \$25,000 as a business bad debt, deducted at full value, on defendant's 1971 income tax return. (A. 191-94; GX. 1, Sch. C-1 and Statement 2).**

* The check which Meyers showed to Crumlish was the same one previously sent to Fernandez, with an alteration made by Meyers after the check had cleared, and which converted the purpose "Personal Loan" into "Personal Investment in P.R., Loan for Joint Participation in Business Transaction." (A. 190-221-23; 235; 248-51; *Compare*, GX. 9, with GX. 9-A; A. 563(1)-563-(2)). Crumlish also identified GX. 28, 29 and 30 as what he thought were the letters shown to him by Meyers to substantiate the business bad debt. (A. 190-91).

** Crumlish, as well as Sidney Buchbinder, the technical advisor to regional counsel of Internal Revenue Service, explained the different tax treatment accorded a business bad debt and a personal bad debt. Whereas a business bad debt is deductible dollar for dollar from a taxpayer's income, a non-business bad debt is limited to \$1,000 in any tax year, with the balance treated as a short-term capital loss. (A. 191-94, 334-35).

4. The \$25,000 is repaid in 1972, but not declared as income on the 1972 return

The understanding between Fernandez and Meyers was that the \$25,000 loan was repayable upon Meyers' request. No request for repayment was made by Meyers until the Fall of 1972, at which time Fernandez returned the \$25,000, plus additional interest, in two separate payments. Meyers instructed Fernandez to issue the checks in the names of defendant's wife and daughter, and Fernandez complied. Fernandez also obtained signed receipts from Meyers acknowledging the fact of repayment. (A. 261-66; GX. 11, 12, 13, 16, 17; A. 565-67, 570-71).

Since Meyers had obtained a tax benefit in 1971 by virtue of his treatment of the \$25,000 Fernandez loan as a business bad debt, he was required to declare the repayment of the \$25,000 as income in 1972. (A. 328-33). Meyers, however, made no mention to Rubin of his recovery of the \$25,000 in 1972, although defendant already had received the full repayment before he met with Rubin. Instead, Meyers advised Rubin that he had incurred further expenses in unsuccessfully attempting to recover his "business bad debt," and instructed Rubin to take these expenses as deductions on the 1972 tax return. The \$25,000, therefore, never was reported as income in 1972. (A. 67-68, 78-79, 278; GX. 2, 24, 31; DX. A; A. 572, 578).

E. The 1973 Audit of Meyers' Return

In the Fall of 1973 the Internal Revenue Service commenced an audit of Meyers' 1972 tax return. Upon learning of the audit, Meyers contacted Rubin, asked him to represent defendant and to conclude the audit as expeditiously as possible. Rubin then met with Revenue Agent Frank Grau at E & E's office in November, 1973. (A. 80-91, 170).

In the course of the audit, Grau determined that there was a large discrepancy between Meyers' total bank deposits and the amount of gross commission receipts reported on the 1972 return. Once learning of the discrepancy, Rubin immediately called Meyers on the floor of the Exchange to ask him if there was an explanation. Meyers replied that the additional bank deposits came from monies he was handling for his ailing father to disburse on his father's behalf, and from investments on his children's accounts. Soon after this telephone conversation, Meyers unexpectedly arrived at Rubin's office and essentially repeated to Grau the same explanations for the discrepancy. Rubin advised Meyers that he would need documentation to support his explanation. Meyers promised that such documentation would soon be forthcoming, and left the office. (A. 86-90, 162-63; GX. 6).

One or two weeks later, Meyers called Rubin and told the accountant that he was having difficulty locating the proceeds from the records of his father's and his children's accounts. The same day Meyers visited E & E's offices and retrieved all of his records for 1972. Shortly thereafter, Rubin received a further request from Meyers' attorney, Kalman Gallop, to return defendant's 1971 records as well. Rubin complied with this request, but by now suspicious of his client, first photocopied the long tape that supported the 1971 total gross commission receipts. (A. 94-98, 156, 160; GX. 4, 4-A).*

The Defense Case

Meyers did not testify, but put in his defense through the testimony of his wife, Maria Meyers, and certain exhibits.

* With the exception of GX. 4-A, no copies were made of the original records provided to E & E by Meyers for both 1971 and 1972, and these documents were in defendant's possession from late 1973 until the trial.

Marie Meyers explained that from 1971 through 1973 she helped her husband with his record keeping. She testified that she wrote out, by hand, the 1971 schedule of deductions, (GX. 7), as dictated to her by her husband. Mrs. Meyers also claimed that she prepared two adding machine tapes from the individual commission advices for 1971, first making a long tape that she removed from the machine when she was interrupted by a phone call, and then later a shorter tape. (A. 343-7).^{*} She identified DX. Q, an adding machine tape with no writing on it, as the shorter tape prepared to go along with GX. 4. According to Mrs. Meyers, after preparing both tapes she left them, together with the corresponding individual advices, in a single envelope for her husband to take to the accountant. (A. 347-49; DX. Q, P-3).

With respect to the information for 1972, Mrs. Meyers identified DX. A as a schedule of deductions prepared by her husband, and DX. C as the adding machine tape prepared by her for the individual commission advices for that year.^{**} Mrs. Meyers claimed that she prepared the 1972 commission tape by separating the individual advices according to brokerage companies, and, in so doing, committed an error by leaving out numerous advices to L.F. Rothschild company.^{***} Again, Mrs. Meyers testified that she placed all of this material, together with her husband's bank statements, into a large envelope and left it for her husband to deliver to the accountant. (A. 358-64, 366; DX. C, D, N).

^{*} Mrs. Meyers later changed her testimony and stated that she prepared the shorter tape first. (A. 349).

^{**} The total figure on DX. C was \$100,230.50, the same amount, rounded to the nearest dollar, that appeared on Line 1, Sch. C. of the 1972 tax return, GX. 2.

^{***} In fact, L.F. Rothschild company was Meyers' largest source of income in both 1971 and 1972, and accounted for approximately one-third of defendant's gross receipts in each of the two years in question.

On cross-examination, Mrs. Meyers conceded that it was her husband, the defendant, who delivered the appropriate information to E & E in both years, although she adamantly refused to admit that she had no knowledge of what documents Meyers actually had delivered to the accountant. (A. 372-78). Mrs. Meyers claimed that the advices in 1971 were not listed in any particular order on the adding machine tape, and specifically denied that the advices were listed in chronological order. (A. 382, 396).^{*} Mrs. Meyers maintained that she prepared the 1971 short commission tape, DX. Q, on the same day that she prepared GX. 4, and that she wrapped the shorter tape around the package of individual advices. She admitted that she knew L.F. Rothschild was a major client of her husband's in both 1971 and 1972. Finally, Mrs. Meyers alternatively blamed the accountant for her husband's difficulties and stated that her husband "tells her every day that she made a mistake" which resulted in his trouble.^{**} (A. 374, 396).^{***}

^{*} In fact, a comparison of the individual advices (DX. P-3) with the sole tape provided to Crumlish, (GX. 4), shows that those advices which were reported to the accountant were listed in strict chronological order.

^{**} Mrs. Meyers generally was an emotional witness on cross-examination. She refused to respond directly to the prosecutor's questions (*see, e.g.*, A. 374), volunteered unresponsive answers to questions that had not been asked, and concluded her cross-examination by lashing out with a personal attack on the prosecutor. (A. 397).

^{***} Mrs. Meyers also acknowledged that line 28 on GX. 7, the schedule of deductions for 1971, related to the \$25,000 Fernandez loan, and admitted that she signed the receipts for repayment of the \$25,000, (GX. 16, 17, although she did not understand that these were receipts for repayment. (A. 392, 371).

In addition to Maria Meyers' testimony, defendant introduced amended tax returns for 1971 and 1972, over the Government's objection. (DX. S, T). These returns, which were filed after the investigation had been referred to the IRS intelligence division following Grau's audit (A. 399), acknowledged that understatements of commission income for both years, but not the return of the Fernandez loan.

The Government's Rebuttal Case

In rebuttal, the Government recalled James Crumlish, who testified that when he prepared the 1971 tax return he found no loose adding machine tape for the commission advices, other than the single long tape, GX. 4. (A. 401-2).*

ARGUMENT

POINT I

The Evidence of Meyers' Willfulness Was More Than Sufficient.

Defendant asserts that the evidence of the willfulness of his attempt to evade taxes was insufficient to sustain the jury's verdict with respect to either count. The argument advanced by Meyers is constructed only upon a topsy-turvy application of the fundamental principles that must be applied by an appellate Court in reviewing the sufficiency of the evidence. Thus, rather than viewing the evidence in the light most favorable to the Government, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. AMREP*, Dkt. Nos. 77-1150-56, slip op. 5157, 5159-60 (2d Cir., August 8, 1977), defendant states the case from the perspective most favorable to him; instead of recognizing the jury's right to credit the Government's witnesses and to disbelieve defendant's wife, as well as to draw reasonable inferences from the proof, *United States v. Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); *United States v. Taylor*, 464 F.2d 240, 242-44 (2d Cir. 1972),

* Crumlish also testified that he did not recall ever seeing DX. Q, and that if he had received a loose or unexplained adding machine tape he would have questioned Meyers about it.

Meyers merely repeats in his appellate brief the same arguments previously made to and rejected by the jury. When these principles are given proper accord in reviewing the evidence, "to which was added the cement of common sense and human experience," *United States v. King*, Dkt. Nos. 76-1435, 76-1440, slip op. 4877, 4883 (2d Cir., July 22, 1977), it becomes apparent that the Government plainly and amply demonstrated Meyers' willful attempted evasion of income taxes in the two consecutive years charged in the indictment, and that a reasonable juror could fairly find defendant guilty beyond a reasonable doubt. *United States v. Hawley*, 554 F.2d 50, 52 (2d Cir. 1977).

An analysis of the sufficiency of the evidence of willfulness must start from the basic, but persuasive, fact that Meyers understated his income by huge amounts in the two consecutive years in question. This consistent pattern of understatement, by a knowledgeable and experienced businessman who plainly should have known whether he earned \$29,000 and \$56,000 * more income than reported during the two consecutive years, was itself enough to warrant the jury's conclusion that defendant's conduct was willful. *Holland v. United States*, 348 U.S. 121, 139 (1954); *Spies v. United States*, 317 U.S. 492, 499 (1943); *United States v. Conlin*, 551 F.2d 534, 536 (2d Cir. 1977); *United States v. Coblenz*, 453 F.2d 503, 505 (2d Cir.), *cert. denied*, 406 U.S. 917 (1972); *United States v. Alker*, 260 F.2d 135, 148 (3d Cir. 1958), *cert. denied*, 359 U.S. 906 (1959); *United States v. Moran*, 236 F.2d 361, 362 (2d Cir.), *cert. denied*, 352 U.S. 909 (1956). Similarly, the very method by which Meyers chose to document his income for his accountants—the use of hundreds of individual commission advices—

* The \$56,000 amount is unreported commissions for 1972 alone and does not include Meyers' recovery of the \$25,000 from Fernandez.

was inherently suspect and indicative of willfulness, given the availability of two alternative sets of 12 documents which conveniently and precisely set forth Meyers' gross commission receipts.*

Meyers' willfulness was also clearly demonstrated by his treatment of the \$25,000 Fernandez transaction.* In all of defendant's actions surrounding this "loan", Meyers showed an acute awareness of tax matters, a readiness to deceive his accountants, a willingness to cause the preparation of phony documents and to alter documents, all in a plain attempt to defraud the Government. The jury was entitled to find that Meyers' alteration of the Fernandez check (GX. 9, 9A) and his instruction to his brother-in-law to create fictitious documentation (GX. 28, 29, 30) used to convince Meyers' accountant to take the business bad debt deduction in 1971, belied any claim of mistake or inadvertence in the understatements of income on his returns. Moreover, defendant's obvious attempt to conceal the monies flowing back to him from the Fernandez transaction—by causing repayment in checks made payable to his wife and daughter (GX. 16, 17) and by failing to disclose to his accountant recovery of the money, at the same time that he told Rubin of his alleged unsuccessful efforts to recapture the loss—invited the justified conclusion that Meyers' conduct involved "conscious wrongdoing" and "an evil state of mind." (A. 524).

* Indeed, during the charging conference with counsel, Judge Brieant observed that this practice readily entitled the jury to find defendant's actions were willful and that "he [Meyers] just created a flimflam to fool a foolish accountant." (A. 416-17).

** Interestingly enough, although the Fernandez transaction is touted by appellate counsel later in his brief as prejudicial error, requiring reversal—a misguided claim we address *infra*, at Point II—defendant's discussion of the sufficiency of the evidence ignores the proper probative value of this proof as demonstrating willfulness.

In the face of this impressive evidence of Meyers' willfulness, we turn briefly to defendant's erroneous claim that a directed verdict of acquittal was required because of the purported defense of reliance on his accountants. First, and obviously, this claim was for the jury to decide. *United States v. Magnus*, 365 F.2d 1007 (2d Cir. 1966), *cert. denied*, 386 U.S. 909 (1967). And, a properly instructed jury—as this one concededly was (A. 525-28)—readily could reject this defense. *United States v. Falcone*, 544 F.2d 607, 610, n.6 (2d Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 1329 (1977). The two accountants for the different years, Crumlish and Rubin, testified that they relied on the specific information supplied to each by defendant in computing his total gross receipts. The clear thrust of Crumlish's testimony was that only *one* adding machine tape and its corresponding individual commission advices were turned over to him by Meyers. That tape contained the notation, in defendant's own handwriting, "total gross floor income, \$89,749.50." In the circumstances of Crumlish's description of the careful manner in which he checked this tape against all advices supplied to him and found no discrepancy, the jury was entitled to find that defendant had not disclosed all pertinent information to E & E. See, *United States v. Falcone*, *supra*. Similarly, the jury readily could discredit the testimony of defendant's wife, Maria Meyers, who offered an inconsistent, but highly interested account of how two tapes were prepared.* With respect to 1972, Rubin testified that the defendant himself

* In this regard, even if Maria Meyers' questionable testimony was believed—given her denial that the longer tape was prepared in any specific order, when in fact GX. 4 followed a strict chronological order—the jury still could have rejected the reliance on accountant defense. It was the defendant who alone delivered the materials to Crumlish, and the existence of two tapes simply was inconsistent with his handwritten notation on the long tape showing the understatement of gross receipts.

confirmed the substantially inaccurate total gross receipts figure for that year. The claim that Rubin should have checked the bank deposits for that year was dispelled by the fact that Meyers did not ask him to perform such a calculation, but merely to store the bank statements with his other materials.* Moreover, when later afforded an opportunity, during the IRS audit, to explain the large discrepancy between his deposits and reported gross receipts for 1972, Meyers responded with a false explanation to Rubin and the agent, in which he attempted to tie the extra funds to non-taxable sources. Thus, there was no support in the record for the claim that if Rubin had examined the bank deposits no understatement would have resulted.

Finally, the reliance on accountants' defense truly sounded hollow in the face of defendant's clear attempts to present fraudulent information both to Rubin and to Crumlish with respect to the Fernandez transaction, and to hide from his accountant the fact that the \$25,000 had been repaid in 1972.

In sum, viewed in its proper perspective, without substituting defendant's "view of the evidence for that of the jury," *United States v. Sears*, 544 F.2d 585, 586 (2d Cir. 1976), the proof at trial overwhelmingly showed indicia of willfulness. The repeated and substantial understatements, the use of an extravagantly confusing and unnecessary set of documents to show total income, the

* Moreover, Rubin testified that he was not performing an audit of Meyers' financial affairs, but simply the preparation of defendant's tax return. Analysis of bank deposits was a procedure associated with a full fiscal audit rather than the mere preparation of a return. (A. 166-67). Indeed, in the prior year Meyers clearly did not expect E & E to analyze his bank deposits since such information never was supplied to Crumlish. (A. 186).

concealment of repayments of funds, and the use of false and altered documents, amply demonstrated that defendant's actions were intentional, deliberate and purposeful. See, e.g., *Holland v. United States*, *supra*; *Spies v. United States*, *supra*; *United States v. Conlin*, *supra*; *United States v. Magnus*, *supra*; *United States v. Schipani*, 362 F.2d 825, 831 (2d Cir.), *vacated and remanded on other grounds*, 385 U.S. 372 (1966); *United States v. Albanese*, 224 F.2d 879 (2d Cir.), *cert. denied*, 350 U.S. 845 (1955). Defendant's claim of insufficiency on this record, therefore, must be rejected.

POINT II

Proof of the Fernandez Transaction Was Properly Admitted Against Defendant and Was Not Misused by the Government.

Meyers seeks reversal of his conviction by claiming, for the first time on appeal, that admission of the underlying facts relating to the \$25,000 Fernandez transaction improperly prejudiced him and was misused by the Government to characterize him as a "bad man." This contention, however, never was made in the District Court, where all of the evidence concerning the Fernandez loan came in *without a single objection* from experienced defense counsel. Similarly defendant did not interpose even one objection to the prosecutor's proper use of this evidence in summation that is now claimed to warrant reversal. Although defendant assigns vigorous claims of prejudice to the introduction of the facts underlying the Fernandez loan,* at no place in his pointed appellate brief does he make mention of the complete absence of any objection by defense counsel at trial to this evidence. The

* For the Court's convenience, we will briefly reiterate the pertinent facts in connection with this transaction, which are set forth more fully *supra*, at 10.

[Footnote continued on following page]

failure to have objected to this evidence in a proper fashion in the District Court precludes assertion on this appeal of any error relating to this proof. *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), cert. denied, — U.S. —, 97 S. Ct. 2686 (June 6, 1977), and cases cited therein. See also, *United States v. Martinez-Carcano*, 557 F.2d 966, 969 (2d Cir. 1977); *United States v. Garguilo*, 554 F.2d 59, 63 (2d Cir. 1977).

Moreover, even on the merits of his argument, defendant's claim is fatally deficient. Contrary to Meyers' formulation of the issue in this Court, the Fernandez transaction was not proof of other wrongdoing by defendant, but was direct evidence relating to his failure to declare the \$25,000 in income in 1972, as specifically charged in Count Two of the indictment.* Accordingly, the Govern-

In 1971 Meyers loaned to his brother-in-law, Marcelino Fernandez, \$25,000 as a non-interest personal loan, repayable upon demand. Throughout 1971 Meyers never thereafter demanded repayment. In 1972, however, Meyers instructed Fernandez to create phony documentation to show that the loan was for an investment and that the proceeds were unrecoverable. This documentation later was shown by Meyers to his accountant, James Crumlish, to support a claimed business bad debt deduction for 1971. At the same time, Meyers altered the stated written purpose on the face of his \$25,000 check to Fernandez.

In 1972, Meyers later received back the full proceeds of the loan, plus interest, through checks made out to his wife and daughter, at defendant's direction. Recovery of the loan proceeds, which should have been declared as income in 1972, never was brought to the attention of the second accountant, Michael Rubin. Instead, Meyers asked him to take a further deduction of alleged expenses incurred in attempting unsuccessfully to recapture the \$25,000.

* In this respect, among others, the cases cited by defendant in Point II of his brief, are readily distinguishable. Thus, for example, in *Blumberg v. United States*, 222 F.2d 496 (5th Cir. 1955); *Hartman v. United States*, 215 F.2d 386 (6th Cir. 1954); and *United States v. Klein*, 131 F. Supp. 807 (S.D.N.Y. 1955),

[Footnote continued on following page]

ment necessarily was entitled to prove all of the surrounding circumstances of the loan in order to make out its case in chief.*

Even viewed as a similar act, this evidence was probative and admissible. Meyers' defense, from the opening and thereafter throughout the trial, was the claim that his understatements of income were accidental and resulted from the negligence of his accountants. Since defendant thereby specifically placed in issue his intent, knowledge, and whether there was an absence of mistake, proof that he falsified documents that directly related to his income tax returns in question and withheld pertinent information from his accountants, unquestionably was highly probative on these very issues. In fact, given the thrust of defense counsel's cross-examinations of the accountants and the subsequent testimony of Maria Meyers, which purported to suggest that all commission information properly was reported to E & E in both years but was not declared on the tax returns because of the accountants' negligence, it was essential and only fair for the jury to

the evidence complained of did not relate directly to the unreported income charged in each of the respective indictments, and the defendant in each case raised a timely objection to the offer of such proof. Such cases simply are not controlling in the present situation where the proof of the Fernandez transaction had an immediate bearing on the unreported income charged in the indictment, as well as on the specific questions of intent, knowledge, absence of mistake and the defense of reliance on defendant's accountants.

* Meyers' suggestion that the Government could have satisfied this burden merely by showing the loan, its repayment and the failure to declare the proceeds in 1972, is beguiling. Obviously, to prove repayment the Government had to elicit from Fernandez all of the relevant circumstances in order to show that the \$25,000 repaid in 1972 was the same money previously loaned to him in 1971. Moreover, the events surrounding the loan rebutted any possible claim that Meyers inadvertently forgot to mention its repayment to his accountant.

learn that during the same time defendant readily gave false information to his accountants and withheld vital matters from them.

In such circumstances, the evidence relating to the \$25,000 Fernandez loan was a classic example of an admissible similar act. Fed. R. of Evid. 404(b); *see also*, *United States v. Nemes*, 555 F.2d 51 (2d Cir. 1977), *United States v. Braunig*, *supra*; *United States v. Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975), and cases cited therein.* Indeed, this case surely follows *a fortiori* from numerous cases where this Court has readily found admissible, on the question of intent or absence of mistake, evidence of similar acts relating to charged violations of the Internal Revenue laws. *See e.g.*, *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *United States v. Alker* *supra*. Accordingly, Judge Brieant's willingness to admit this evidence, particularly in the absence of any objection voiced by defense counsel, by no stretch of the imagination can be considered arbitrary or irrational. *United States v. Robinson*, Dkt. No. 76-1153, slip op. 5021, 5034 (2d Cir., July 28, 1977) (*en banc*).

The claim that the Government misused this evidence is simply unfounded on the record.** In the opening and

* As this Court regularly has observed: "Thus, we are by now firmly wedded to the inclusory form of the rule that evidence of other crimes is admissible, if relevant, except when offered solely to prove criminal character" *United States v. Papadakis*, *supra*, 510 F.2d at 294.

** Defendant devotes large portions of his appellate brief to the claim that the trial court erred in allowing proof concerning the circumstances under which a business bad debt would be more favorable to a taxpayer than a non-business bad debt. Again, defendant fails to note that this limited proof—which

[Footnote continued on following page]

rebuttal summations—to which *no* objection was made by defense counsel—the prosecutor merely argued to the jury that defendant's treatment of the \$25,000 loan demonstrated Meyers' deliberate conduct, the withholding of pertinent information from his accountant and further dispelled the claim of accidental understatements of income in the same two years in question. Defendant's present objection to these proper comments reflects no more than his belated, but understandable, unhappiness with the fact that the arguments were persuasive. However, since Meyers chose to rest his defense at trial on the claim of accidental mistake and negligence by his ac-

consisted of two questions to two different witnesses—was not objected to by defense counsel, and, in any event, proved what Judge Brieant found was the obvious, even without testimony: that in almost every case a business bad debt would be more favorable to a taxpayer. (A. 408). The distinction between the two types of debt, moreover, was relevant because it showed defendant's special awareness of tax matters and thus further supported the Government's theory that Meyers' evasion was deliberate and wilful.

Equally misguided is defendant's contention that his well-documented diaries (GX 24, 31) were somehow used improperly by the Government. The prosecutor simply argued that these diaries—which contained careful substantiation for expenses incurred on every day of the relevant years—belied the claim that defendant negligently mishandled his own income records, an argument that Judge Brieant specifically found was a proper one to make to the jury. (A. 275-76, 278). Moreover, the only specific entries to which the jury's attention was directed, concerned Meyers' purported expenses in connection with recovering the \$25,000 Fernandez loan—expenses which, given the other proof concerning this transaction, were patently false. Finally, the trial court allowed defendant to ask for redaction of any diary entries that were claimed to be prejudicial. In response, defendant merely objected on the narrow ground of relevance, but did not claim that any of the entries was unfairly prejudicial.

countants, he cannot now be heard to complain that the Government answered these contentions too well.

Finally, the contention that the trial judge should have given a limiting instruction to the jury concerning this proof cannot seriously be urged. At no time did defense counsel request such an instruction or object to its absence. Consequently, even if the Fernandez transaction constituted proof of a similar act, the lack of a limiting instruction was not plain error. *United States v. Natale*, 526 F.2d 1160, 1174 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976); *United States v. Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976).

POINT III

The Trial Court Did Not Prohibit Defendant From Developing A Defense Relating to the Fernandez Loan.

Meyers argues that Judge Brieant precluded him from developing a defense with respect to receipt of the \$25,000 Fernandez loan. Defendant asserts, without any basis in the trial record, that on two specific occasions the District Court's rulings somehow prevented defendant from placing before the jury an explanation for the \$25,000 loan that would have made it a non-taxable source of income. In fact, however, the record plainly shows that defendant never was precluded from developing such proof, never sought to, and never suggested to the trial judge that the effect of his rulings was to exclude such evidence. Thus, there is simply no basis in the record for this claim now incredibly advanced on appeal as requiring reversal.

In support of his claim, defendant relies first upon the trial judge's brief interruption of a single question asked

by defense counsel on cross-examination of Fernandez.* How this proper objection by the trial court to an improper question precluded assertion of defendant's explanation of the \$25,000 transaction is not fathomable. The district judge simply was stating the obvious, that the exhibit referred to "speaks for itself," and in no way blocked further inquiry into any relevant matter. Indeed, Judge Brieant previously had allowed defendant substantial leeway in the cross-examination of Fernandez (*see, e.g.,* A. 285, 295-98), and at no point either before or after this incident did counsel directly confront the witness with any other explanation of the \$25,000 transaction or suggest that such explanation was forthcoming.

Equally astounding and unjustified is defendant's assertion that the trial judge refused to allow defense counsel to develop a purported explanation of the Fernandez loan through the direct testimony of Maria Meyers. The incident to which defendant points occurred as follows. On direct examination Mrs. Meyers was asked for her understanding of the Fernandez receipt, acknowledging repayment of the \$25,000 to Meyers. (GX. 16 & 17). In response, she testified:

"Before my father died, he always told me I had share or piece of the firm. He told my brother that he would always give it to me." [A. 372-73].

* The cited incident is as follows:

"Q. Both receipts [referring to GX. 16, 17] begin with the same phrase, 'I received from Frozen, Inc.'

Is there any indication on either receipt that this money was originally given to you as a personal loan?

THE COURT: They are in evidence and they speak for themselves and we are wasting time. Go on to the next question. They may be read to the jury or shown to the jury and the members of the jury may look at any exhibits they want during their deliberation." (A. 308-09).

At this point, the witness broke down and started to cry, whereupon the court took a brief recess.* Following the recess, defense counsel asked the reporter to reread the question, but was directed by the trial judge to "just frame the next question." Judge Briant also observed that

"The death of her father has nothing to do with this case. Let's go on and talk about the case."

Defense counsel then, without more, chose on his own to terminate the direct testimony. Counsel never suggested that a properly phrased question would elicit the evidence that is now claimed would have been forthcoming had the witness answered. No additional questions were put to the witness and *no offer of proof was made*. See, Fed. R. of Evid. 103(a)(2). Nor did counsel in any way suggest that he viewed the trial judge's ruling as a restriction on defendant's case, or a bar to relevant proof about the Fernandez loan. See, *United States v. Badalamente*, 507 F.2d 12 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975). Thus, the record as left by defendant, simply precludes the present claim, *United States v. Braunig*, *supra*, and renders meaningless and astounding the conclusory assertion that the trial court in any way hampered the defense.

* Although the record merely shows the "the Court took a recess," in fact the recess was occasioned by the witness' emotional inability to continue with her testimony.

POINT IV

The Trial Court's Charge Was In All Respects Correct and Proper.

As a final matter, Meyers levels an attack against certain portions of the District Court's charge, specifically those relating to the instructions on "willfulness" and "reasonable doubt." An analysis of the challenged excerpts from the charge, however, makes manifest that Judge Brieant properly instructed the jury in conformity with well-settled law.

First, Meyers argues that although the trial court charged on willfulness "substantially in accord with the cited cases" (Br. 10), the instruction nevertheless requires reversal because of the failure to accentuate "bad purpose or evil motive." The simple answer to this claim is that the instruction given by Judge Brieant, the relevant portion of which we have excerpted in the margin,* "adequately informed the jury of the quality of evidence needed to convict," and plainly passed muster with the applicable standard enforced by the Supreme Court and this Court. *United States v. Conlin*, 551 F.2d 534, 536 (2d Cir. 1977). See also, *United States v. Pomponio*, 429 U.S. 10 (1976); *United States v. Bishop*, 412 U.S. 346, 360 (1973); *United States v. Garguilo*, *supra*, 554 F.2d at 62, 3320. Nothing more was required.

* In relevant part, Judge Brieant charged:

"To act wilfully, means that one does an act purposely and with the specific intent to disregard the law, or to do that which the law forbids. Willfulness involves conscious wrongdoing or, as it has sometimes been stated, an evil state of mind, a specific criminal intent and purpose to violate the law. In this case, to cheat the government out of a substantial part of the taxes known by the defendant to be due." (A. 524; see also, A. 523-28).

Second, Meyers urges that the trial court committed error in refusing to give the so-called "two inference rule" instruction on reasonable doubt.* Under the prevailing law in this Circuit, however, defendant was not entitled to the requested instruction and the trial judge's refusal to give it obviously was not error. *United States v. Turbide*, 558 F.2d 1053, 1063 (2d Cir. 1977); *United States v. Siragusa*, 450 F.2d 592, 596 (2d Cir. 1971), *cert. denied*, 405 U.S. 974 (1972), and cases therein cited. *See also, Holland v. United States, supra*. The District Court's charge on reasonable doubt (A. 504-06) was fair, complete and unquestionably conformed to time-honored language approved by this Court. *See, e.g., United States v. Magnano*, 543 F.2d 431, 436-37 (2d Cir. 1976), *cert. denied*, — U.S. —, 97 S. Ct. 1101 (Feb. 22, 1977).

* The instruction requested by defendant was as follows:

"If, after considering all the evidence before you against the defendant, you find the evidence reasonably permits two conclusions—one consistent with his innocence and the other consistent with guilt—you must accept the conclusion of innocence and acquit the defendant. For, then, the Government has not met its duty of proving the defendant's guilt beyond a reasonable doubt; and the presumption of innocence has not been overcome." (A. 11).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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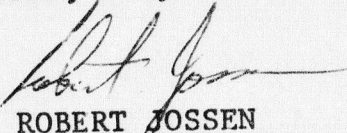
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT JOSSEN being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 2nd day of November, 1977,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
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ROBERT JOSSEN

Sworn to before me this

2nd day of November, 1977
Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978

